No. 83-1921

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE TRANE COMPANY AND MAURICE BOUCHARD,
Petitioners,

v.

MALCOLM BALDRIGE, Secretary of the
United States Department of Commerce, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

BRICE M. CLAGETT
JOHN L. ELLICOTT
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5316

Attorneys for Petitioners

August 1984

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1921

THE TRANE COMPANY AND MAURICE BOUCHARD,
Petitioners,

v.

MALCOLM BALDRIGE, Secretary of the
United States Department of Commerce, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

In their Brief in Opposition ("Opp. Brief"), respondents present two arguments which are not to be found in the opinions of the courts below. Petitioners submit this Brief in reply to those arguments.

I.

Respondents argue that responses to boycott-related questionnaires should not be regarded as speech and are wholly beyond the scope of First Amendment protection. *See* Opp. Brief at 5-7.

The argument is supported by none of the cases on which respondents rely. For First Amendment purposes, speech is

defined at least as broadly as it is in ordinary discourse. It encompasses all communication of thought by means of spoken or written words, as well as "symbolic speech." *Cf., e.g., Spence* v. *Washington,* 418 U.S. 405, 410 (1974); *Tinker* v. *Des Moines School District,* 393 U.S. 503, 505-06 (1969). Responses to questionnaires fall within the realm of constitutionally protected speech.

The series of cases cited by respondents stand instead for the proposition that the government may prohibit speech incident to or in perpetration of unlawful activity. In each case, the government clearly had the power to prohibit the unlawful activity. Where the Court faced the question, it held that the fact that the unlawful activity was carried out partially by means of speech did not prevent the government from prohibiting it. In this case, on the contrary, the proposed speech has been prohibited even though it is unrelated to illegal conduct.

In two of the cases, the prohibition of speech was designed to prevent the perpetration of fraud by means of false or misleading statements. *See Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S 976 (1969).

In *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 617-18 (1969), the Court permitted the government to prohibit "a threat of retaliation based on misrepresentation and coercion," but expressly noted that the First Amendment protects speech in the context of a labor dispute that does not amount to an unfair labor practice. *See also Luxuray of New York* v. *NLRB,* 447 F.2d 112, 116 (2d Cir. 1971).

In three cases, the prohibited speech constituted a restraint of trade or commerce in violation of the Sherman Antitrust Act. *See National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978); *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969); *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921).

In *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949), the Court upheld an injunction against labor-union picketing in violation of a state antitrust statute, and specifically noted that "appellants were doing more than exercising a right

of free speech or press"; they rather "were exercising their economic power together with that of their allies . . . ." *Id.* at 503.

In a final case, the Court upheld state-bar disciplinary action for a lawyer's use of information "as bait" in in-person solicitation of accident victims in violation of the state bar's Code of Professional Responsibility. *See Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 458 (1978).

The underlying premise of all the cases cited by respondents is that speech is beyond the protection of the First Amendment when it is an integral part of non-speech conduct or activity which the government may constitutionally prohibit. None of these cases is relevant. The law and regulations challenged in this case are not designed to prohibit misleading information, and it is undisputed that petitioners' answers to the questionnaires would be truthful. No claim has been made that petitioners' answers would interfere with, restrain or coerce any one or that petitioners are conspiring or combining in restraint of trade or overreaching in the course of business solicitation.

Respondents attempt to show the relevance of the cases on which they rely by suggesting that the Arab boycott of Israel is an "unlawful scheme," "contrary to the policy of the United States," and that Congress has not explicitly declared it to be illegal "presumably because it consists entirely of actions by foreign states . . . ." *See* Opp. Brief at 6, 9.

Respondents are correct that the Arab boycott is not illegal under the law of the United States. They are incorrect, however, in the reasons for that. The United States has jurisdiction over an action of a foreign sovereign outside the United States when that action has a "direct" or "substantial" effect within the United States. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2); *Restatement, Foreign Relations Law of the United States (Revised)* § 402(1)(c) (Tent. Draft No. 2, 1981). The reason the United States has not declared the boycott illegal is that it could not do so without violating international law, for international law considers boycotts to be legal. *See Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845, 866 (2d Cir. 1962), *rev'd on other*

grounds, 376 U.S. 398 (1964); Muir, "The Boycott in International Law," 9 J. Int'l L. & Econ. 187, 202 (1974); Lauterpacht, "Boycott in International Relations," 14 Brit. Y. B. Int'l L. 125, 130, 139-40 (1933).

Any nation may choose, in the exercise of its sovereign rights, which foreigners it will allow to do business within its borders and on what terms and conditions such business may be conducted. A boycotting country has the right under international law to choose not to trade with, and to prohibit its nationals from trading with, foreign companies that deal with boycotted countries, with blacklisted companies, or with foreign companies that fail to respond to questionnaires. *See, e.g., Restatement (Second), Foreign Relations Law of the United States* §§ 17, 18, 30 (1965). The United States has not attempted to make such conduct unlawful; if it did, it would violate international law.

There is therefore an essential difference between this case and all the cases cited by respondents. In those cases the prohibited speech was an integral part of illegal activity. In this case Congress and the Department of Commerce have simply chosen to prohibit speech of which they disapprove.

II.

Respondents claim that "all the courts below found" that "petitioners would be directly contributing to the success of the boycott if they provided the information sought in the questionnaires." Opp. Brief at 5. In fact *none* of the courts below made precisely that finding. The passages cited by respondents all make the different point that answers to the questionnaries would allow Arab boycott officials to satisfy their need, if any, for the information without the inconvenience of consulting public sources. *See* Petition for a Writ of Certiorari, Appendix

("Pet. App.") at 11a. Moreover, the impact on the success of the boycott was not, in the courts' view, the principal governmental interest involved in the law and regulations. Rather, the courts found that the governmental interest, involving "delicate foreign policy questions," was to prevent American citizens from participating in "actions which are repugnant to American values and traditions." Pet. App. at 18a, 47a-48a. Respondents evidently find this reasoning so disreputable that they have studiously ignored it and thereby rejected the basis of decision of all of the courts below.

CONCLUSION

In their Brief in Opposition, respondents have concentrated on arguments not to be found in the decisions below, and have ignored the principal basis for those decisions. Respondents thus seem to indicate that they do not find the opinions of the courts below to be sound or satisfactory. That is further good reason why the Court should grant review of the issues raised here.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRICE M. CLAGETT
JOHN L. ELLICOTT
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5316

Attorneys for Petitioners

August 1984